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## DISCOVERY OF EXPERT OPINIONS AND CONCLUSIONS IN CONDEMNATION PROCEEDINGS IN FEDERAL AND CALIFORNIA COURTS

To determine the singularly most important issue in a condemnation proceeding—the amount of just compensation<sup>1</sup>—the parties litigant must rely heavily upon the reports of expert appraisers.<sup>2</sup> In eminent domain controversies, therefore, the issue of whether or not the knowledge and opinions of expert appraisers are discoverable by the adverse party before trial is of particular significance.<sup>3</sup> The recent Ninth Circuit decision of *United States v. Meyer*<sup>4</sup> carried the federal courts beyond prior holdings by allowing complete discovery of the adverse party's expert appraisers (including opinions and conclusions) in a condemnation action.<sup>5</sup> The purpose of this comment will be to examine the federal practices concerning discovery of expert knowledge and opinion in condemnation proceedings, and to compare this practice with that of California.

### I. Background—The Federal Rules

The procedural framework for pre-trial activities of parties within the federal system is governed by the deposition-discovery process established by the Federal Rules.<sup>6</sup> Accordingly, a brief examination of those federal rules most directly affecting condemnation proceedings is necessary to a clear understanding of the development of the law in this field.

As originally promulgated for condemnation proceedings, the Federal Rules governed only the procedure for appeals.<sup>7</sup> Because of this lack of an established procedure for the overall condemnation of property, there was little uniformity in federal condemnation actions.<sup>8</sup> As

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<sup>1</sup> See, e.g., *United States v. 900.57 Acres of Land*, 30 F.R.D. 512 (W.D. Ark. 1962).

<sup>2</sup> See, e.g., *United States v. Meyer*, 398 F.2d 66, 69 (9th Cir. 1968).

<sup>3</sup> See generally, 6 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 26.22 (rev. 3d ed. 1965).

<sup>4</sup> 398 F.2d 66 (9th Cir. 1968). This decision has been acclaimed as a "landmark opinion" by at least one source. See *The Recorder*, July 23, 1968, at 1, col. 6.

<sup>5</sup> *United States v. Meyer*, 398 F.2d 66, 69 (9th Cir. 1968).

<sup>6</sup> See 4 J. MOORE, *FEDERAL PRACTICE* ¶¶ 26-37 (2d ed. 1968) [hereinafter cited as *MOORE'S FEDERAL PRACTICE*].

<sup>7</sup> *MOORE'S FEDERAL PRACTICE*, *supra* note 6, ¶ 71A.20[2], at 2673.

<sup>8</sup> *Armstrong, Report of the Advisory Committee on the Federal Rules of Civil Procedure Recommending Amendments*, 5 F.R.D. 339, 357 (1946) [hereinafter cited as *Armstrong, Report*].

a result of this confusion, Federal Rule 71A was enacted<sup>9</sup> on August 1, 1951, to provide a uniform procedure for condemnation in the federal district courts.<sup>10</sup> However, while Rule 71A prescribes the specialized procedure required for the condemnation of land, it does not delineate any special rules for discovery in condemnation actions. Rather, it adopts the framework of the general deposition-discovery rules contained in Rules 26 through 37.<sup>11</sup> Thus, since August, 1951, the discovery procedures in federal condemnation actions have been governed by Federal Rules 26 through 37.<sup>12</sup>

The purpose of formulating these Rules was, in the words of Justice Douglas, "to make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent."<sup>13</sup> Further, Rule 1 provides that these rules shall be liberally construed:<sup>14</sup> "[The Rules] shall be construed to secure the just, speedy and inexpensive determination of every action."<sup>15</sup>

The three important rules forming the basis of discovery are Rules 26, 33, and 34. Rule 26 establishes the procedure for taking the deposition of the adverse party's expert witness.<sup>16</sup> Rule 33 provides a pre-trial method of obtaining written interrogatories from an adverse party, and from the adverse party's expert appraiser.<sup>17</sup> Rule 34 requires, upon the showing of good cause, "the discovery and production of documents and things for inspection, copying or photographing."<sup>18</sup>

In a condemnation action, the request under Rule 34 is usually for lists of comparable sales, or documents containing factual information upon which an appraisal has been based.<sup>19</sup> But if the expert's con-

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<sup>9</sup> J. MOORE & H. FINK, *MOORE'S FEDERAL PRACTICE—RULES PAMPHLET* 1129 (1968) [hereinafter cited as *MOORE'S RULES PAMPHLET*].

<sup>10</sup> 7 *MOORE'S FEDERAL PRACTICE*, *supra* note 6, at 2763.

<sup>11</sup> FED. R. CIV. P. 71A: "The rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule." Moore explains the interrelation of Rule 71A and the other Federal Rules as follows: "Subdivisions (b)—(1) of Rule 71A prescribe such specialized procedure as is required by condemnation proceedings; and, subject to their provisions, subdivision (a) provides that the other Federal Rules govern the procedure. In the language of the Committee, the purpose of subdivision (a) is to utilize 'the general framework of the Federal Rules where specific detail is unnecessary.' Full play, therefore, be given to the other Federal Rules of Civil Procedure, 'except as otherwise provided' in Rule 71A." 7 *MOORE'S FEDERAL PRACTICE*, *supra* note 6, at 2765 (footnotes omitted).

<sup>12</sup> 7 *MOORE'S FEDERAL PRACTICE*, *supra* note 6, at 2764-65.

<sup>13</sup> *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682-83 (1958).

<sup>14</sup> *MOORE'S RULES PAMPHLET*, *supra* note 9, at 207.

<sup>15</sup> FED. R. CIV. P. 1.

<sup>16</sup> *Id.* 26.

<sup>17</sup> *Id.* 33.

<sup>18</sup> *Id.* 34.

<sup>19</sup> See, e.g., *United States v. 900.57 Acres of Land*, 30 F.R.D. 512 (1962).

clusions are made discoverable, as in *United States v. Meyer*,<sup>20</sup> future requests under Rule 34 will probably be directed at the appraiser's report itself.

One important aspect of Rule 26 is the delineation of the permitted scope of examination. That rule provides that the deponent may be examined concerning any non-privileged, relevant matter.<sup>21</sup> This scope of examination applies not only to Rule 26, but also to Rules 33<sup>22</sup> and 34.<sup>23</sup> Thus the scope of discovery should be the same regardless of the method selected by the party seeking discovery.<sup>24</sup>

The promulgation of Rules 26 to 37 satisfied an historic need for specific legal machinery in the federal courts to disclose and to narrow the real issues in dispute between the parties and to afford an adequate factual basis for preparation for trial.<sup>25</sup> The landmark decision of *Hickman v. Taylor*<sup>26</sup> described the deposition-discovery mechanism established by Rules 26 to 37 as "one of the most significant innovations of the Federal Rules of Civil Procedure."<sup>27</sup> The opinion explained the purpose of the deposition-discovery procedure developed in the Federal Rules,<sup>28</sup> and then succinctly stated the policy underlying the promulgation of these discovery rules:

[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever

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<sup>20</sup> *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968).

<sup>21</sup> FED. R. CIV. P. 26(b): "[T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or the defense of the examining party or to the claim or defense of any other party. . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

<sup>22</sup> Rule 33 states that: "Interrogatories may relate to any matter which can be inquired into under Rule 26(b) . . . ."

<sup>23</sup> Rule 34 allows discovery of materials "which constitute or contain evidence relating to any of matters within the scope of the examination permitted by Rule 26(b) . . . ."

<sup>24</sup> See 4 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 33.02.

<sup>25</sup> *Id.* ¶ 26.02[1], at 1031.

<sup>26</sup> 329 U.S. 495 (1947).

<sup>27</sup> *Id.* at 500.

<sup>28</sup> The *Hickman* case explains that: "The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Id.* at 501 (footnote omitted).

facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.<sup>29</sup>

## II. Discovery and Condemnation in the Federal Courts

### A. Various Judicial Attitudes Concerning the Extent of Discovery

The pre-trial discovery of expert opinion is not prohibited per se by the Federal Rules.<sup>30</sup> Restrictions beyond those found in Rule 26(b),<sup>31</sup> which endure in the federal system, have developed in the decisions handed down by the federal courts themselves.<sup>32</sup> Concerning the lack of statutory guidance and the resulting want of uniformity, one recent decision explains that "the District Courts have been left much to their own devices with a resultant diversity of opinion in regard to discovery of expert opinion."<sup>33</sup> Apart from *United States v. Meyer*,<sup>34</sup> the federal courts can be divided into four groupings according to the restrictions they have developed.

#### 1. No Discovery Concerning Appraisers

The first group of federal district courts hold that, in condemnation actions, the opponents are not even entitled to obtain the names and addresses of appraisers.<sup>35</sup> This complete bar to discovery is applied to appraisers that will be called at trial, as well as to those appraisers used exclusively for trial preparation. There are two rationales frequently given for such denial. The first is that since the major purpose of discovery is the narrowing of the issues for trial, there is no need for discovery in condemnation because just compensation is almost always the sole issue in a condemnation action.<sup>36</sup> The second

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<sup>29</sup> *Id.* at 507 (footnote omitted).

<sup>30</sup> See FED. R. CIV. P. 26(b).

<sup>31</sup> See the statement of the limitations in Rule 26(b) at note 21 *supra*.

<sup>32</sup> See, e.g., *United States v. Selby*, 25 F.R.D. 12, 14 (N.D. Ohio 1960), where the court, in discussing discovery by interrogatories, restated the prevailing view today that interrogatories may not call for legal conclusions.

<sup>33</sup> *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 413 (N.D. Cal. 1965), *aff'd as modified sub nom. United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968).

<sup>34</sup> *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968).

<sup>35</sup> *United States v. 900.57 Acres of Land*, 30 F.R.D. 512, 520 (W.D. Ark. 1962) (discovery rules should be liberally construed in the interest of justice, but no discovery in condemnation action); *United States v. 6.82 Acres of Land*, 18 F.R.D. 195, 197 (D.N.M. 1955) (absolute denial of discovery of appraisers' names); *United States v. 7,534.04 Acres of Land*, 18 F.R.D. 146 (N.D. Ga. 1954) (names of government appraisers not obtainable by property owners); *Hickey v. United States*, 18 F.R.D. 88, 89 (E.D. Pa. 1952) (disallowed interrogatories seeking names and addresses of expert appraisers).

<sup>36</sup> E.g., *United States v. 7,534.04 Acres of Land*, 18 F.R.D. 146 (N.D. Ga. 1954); see *United States v. 900.57 Acres of Land*, 30 F.R.D. 512 (W.D. Ark. 1962).

rationale for such denial is that the condemnee, and not the condemnor, has the burden of establishing the market value of the condemned land, and, therefore, is not entitled to discovery.<sup>37</sup>

## 2. *Discovery Limited to Facts*

The second group of federal district courts allow discovery of facts upon which the appraisal reports are based, but will not allow discovery of the reports themselves or of the opinions of the appraisers contained in the reports.<sup>38</sup> These are the courts that have formulated the general rule of non-discoverability of opinionative materials.<sup>39</sup> Within the group, however, there are courts that attempt to expand the area of permissible discovery while retaining the basic fact-opinion distinction. For example, one court has suggested the adoption of a liberal approach in distinguishing facts from opinions;<sup>40</sup> while another court has held that unprivileged factual data are discoverable even though connected in some way with the appraisal opinion.<sup>41</sup> Nevertheless, in theory, these courts continue to permit the discovery of facts only.

## 3. *Discovery of Comparable Sales Data Permitted*

The third group of federal district courts allow discovery of comparable sales data before trial in condemnation actions.<sup>42</sup> This data consists of those sales that, according to one New York decision, are or should be taken into consideration in determining the fair and reason-

<sup>37</sup> See, e.g., *United States v. 7,534.04 Acres of Land*, 18 F.R.D. 146 (N.D. Ga. 1954).

<sup>38</sup> *United States v. 4.724 Acres of Land*, 31 F.R.D. 290, 292 (E.D. La. 1962) (no discovery of opinionative material without special circumstances); *United States v. 284,392 Square Feet of Floor Space*, 203 F. Supp. 75, 77-78 (E.D.N.Y. 1962) (discovery limited to facts upon which opinions or conclusions are based); *United States v. 19.897 Acres of Land*, 27 F.R.D. 420, 422-23 (E.D.N.Y. 1961) (no conclusions, merely facts); *United States v. Certain Parcels of Land*, 25 F.R.D. 192, 193 (N.D. Cal. 1959) (no discovery of opinionative materials without special circumstances); *United States v. 50.34 Acres of Land*, 12 F.R.D. 440, 442 (E.D.N.Y. 1952) (earlier hearing allowed discovery of appraisal report, however, discovery limited to facts and comparable sales); see *United States v. 48.19 Acres of Land*, 32 F.R.D. 462 (S.D. Cal. 1963).

<sup>39</sup> *United States v. Certain Parcels of Land*, 25 F.R.D. 192, 193 (N.D. Cal. 1959).

<sup>40</sup> *United States v. 284,396 Square Feet of Floor Space*, 203 F. Supp. 75, 78 (E.D.N.Y. 1962).

<sup>41</sup> *United States v. Certain Parcels of Land*, 25 F.R.D. 192, 193 (N.D. Cal. 1959).

<sup>42</sup> *United States v. 3595.98 Acres of Land*, 212 F. Supp. 617, 618-19 (N.D. Cal. 1962) (should be required to exchange comparative sales before trial); *United States v. 19.897 Acres of Land*, 27 F.R.D. 420, 423 (E.D.N.Y. 1961) (exchange lists of sales); see *United States v. 50.34 Acres of Land*, 12 F.R.D. 440, 442 (E.D.N.Y. 1952). See generally Carter, *Pre-Trial in Condemnation Cases, A New Approach*, 40 AM. JUDICIAL Soc'y 78 (1956).

able value of the condemned property.<sup>43</sup> The interest in discovery of such comparable sales is generated by the fact that such lists of sales are said to be the best evidence of fair market value.<sup>44</sup> In addition, such evidence would provide the opponent's experts with a firm basis upon which to establish their own appraisal reports. Courts that refuse to permit discovery of opinions, therefore, could still allow discovery of comparable sales data.

#### 4. *Discovery of Some Expert Opinion Allowed*

The final group of federal district courts allow some discovery of the adverse party's expert opinion.<sup>45</sup> However, in each case so holding the extent of discoverable opinion has been limited.<sup>46</sup> The important fact remains, however, that these courts are at least willing to venture into this difficult area<sup>47</sup> and to allow to some degree the discovery of expert opinion.

#### 5. *General Federal Practice—No Discovery of Expert Opinion*

The four classifications of the federal district courts demonstrate the diversity that exists in the federal system. Out of this diversity, however, has developed one generally accepted view—there can be no discovery of the opinions and conclusions of experts.<sup>48</sup> This general limitation has been of critical significance because of the importance

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<sup>43</sup> *United States v. 19,897 Acres of Land*, 27 F.R.D. 420, 423 (E.D.N.Y. 1961).

<sup>44</sup> *United States v. 5139.5 Acres of Land*, 200 F.2d 659, 662 (4th Cir. 1952); *Baetjer v. United States*, 143 F.2d 391, 397 (1st Cir. 1944); see *United States v. New River Collieries Co.*, 262 U.S. 341, 345 (1923).

<sup>45</sup> *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 598 (D. Md. 1963); see *United States v. 1,278.83 Acres of Land*, 12 F.R.D. 320, 321 (D. Va. 1952).

<sup>46</sup> In *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 595 (D. Md. 1963), what was sought by the interrogatories was the opinion of the experts on a certain aspect of the value. The interrogatories fell short of asking the expert to state his ultimate conclusions about the valuation to be placed on the land. In *United States v. 1,287.83 Acres of Land*, 12 F.R.D. 320, 321 (D. Va. 1952), discovery of some opinion was allowed, but discovery of the value placed on the land was not allowed.

<sup>47</sup> See generally Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962) [hereinafter cited as Friedenthal]; Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111 (1965) [hereinafter cited as Long, *Discovery*]; Wright, *Discovery*, 35 F.R.D. 39 (1965); Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961).

<sup>48</sup> Cases cited notes 36-43 *supra*; Ferguson, *Pretrial Discovery of Expert Opinion*, 4 ARIZ. L. REV. 267, 268-69 (1963); Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026, 1049-51 (1950); Wright, *Discovery*, 35 F.R.D. 39, 56-57 (1965); Note, *The Scope of Discovery Under Rule 33 of the Federal Rules of Civil Procedure*, 15 SO. CAR. L. REV. 677, 691-92 (1963); See Note, *Discovery—Opinion Of Adverse Party's Prospective Appraiser*, 111 U. PA. L. REV. 509, 510 (1963).

of expert opinion in the proper adjudication of the issues of condemnation cases, for example, in the determination of land values.<sup>49</sup>

Even when discovery of opinions is permitted, the party seeking discovery will have to display extreme need, and demonstrate his inability to obtain expert opinion on the same matter from another source.<sup>50</sup> Moore extends a formula that conforms to the policy of these courts:

The court should not ordinarily permit one party to examine an expert engaged by the adverse party, or to inspect reports prepared by such expert in the absence of a showing that the facts or the information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research.<sup>51</sup>

At one time the controversy over the discoverability of expert opinion was of such magnitude that the Advisory Committee on Amendments to the Federal Rules recommended that the conclusions of experts be given statutory immunity from discovery. Under this proposed amendment,<sup>52</sup> which was never adopted,<sup>53</sup> the only expert opinions and conclusions that could have been discovered would have been those found in the report of a physician who examined a plaintiff in a personal injury suit.<sup>54</sup> Despite the decision not to adopt the proposed amendment, most courts continue to hold that in a condemnation action there can be no discovery of expert opinion.<sup>55</sup>

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<sup>49</sup> *United States v. Meyer*, 398 F.2d 66, 69 (9th Cir. 1968).

<sup>50</sup> Kaskell, *United States and Discovery Under the Federal Rules of Civil Procedure*, 13 LOYOLA L. REV. 1, 15 (1967) [hereinafter cited as Kaskell]; see, e.g., *Smith v. Hobart Mfg. Co.*, 188 F. Supp. 135 (D. Pa. 1960).

<sup>51</sup> 4 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 26.24, at 1531.

<sup>52</sup> *Armstrong, Report*, *supra* note 8, at 356. The proposed amendment stated that: "The courts shall not order the production or inspection of any writing obtained or prepared by the adverse party [or] his attorney . . . in anticipation of litigation or in preparation for trial unless satisfied that the denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense . . . . The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions or legal theories, or, except as provided in Rule 35, the conclusions of an expert." (Footnote omitted). See also 2A W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 652.5, at 153-54 (Wright ed. 1961) [hereinafter cited as BARRON & HOLTZOFF].

<sup>53</sup> Such a restriction on discovery of a writing that reflects the conclusions of experts was established in the State of New Jersey. N.J. REV. R. 4:16-2. For an application of this rule, see *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376, 378 (D.N.J. 1954).

<sup>54</sup> *Armstrong, Report*, *supra* note 8, at 356; see also FED. R. CIV. P. 35(b), for the discovery of physician's report.

<sup>55</sup> See, e.g., *United States v. 900.57 Acres of Land*, 30 F.R.D. 512, 519 (W.D. Ark. 1962).



## B. Arguments Against Discovery of Opinions

There are several traditional arguments for denying discovery of expert opinions especially in condemnation actions.<sup>56</sup> The first argument<sup>57</sup> is that, since the principal objective of discovery is to ascertain facts that may assist in the preparation or trial of the proponent's case, such procedure is not relevant to a condemnation action. "Opinions of experts, as disclosed by appraisal reports, do not purport to present facts or factual data necessary or required for the proponent's preparation or trial."<sup>58</sup> Thus the distinction is made between "facts found by an expert and the conclusions he has formed."<sup>59</sup> While this distinction is common in condemnation cases, especially where the land owner wants to examine the reports of appraisers retained by the condemnor,<sup>60</sup> at least two leading writers criticize any such distinction.<sup>61</sup>

The second argument is that the material sought to be discovered is readily available to the opponent,<sup>62</sup> and thus he lacks the necessary good cause required for discovery.<sup>63</sup> This argument not only denies the opponent the production of reports of the adversary's experts, but prevents him from taking the depositions of these experts on the ground that in all cases "duplicate expert testimony is at least theoretically available."<sup>64</sup> As one supporter of this argument explains, in a condemnation action, "[e]xpert opinion and the factual data upon which such opinions are predicated are readily available to both parties and should not be the subject of discovery or examination before trial. . . ."<sup>65</sup>

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<sup>56</sup> For an extended discussion of these arguments see *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 596-98 (1963); Friedenthal, *supra* note 47, at 460-62; Long, *Discovery*, *supra* note 47, at 123-42; Note, *Discovery of Expert Opinion in Land Condemnation Proceedings*, 41 IND. L.J. 506, 507-13 (1966); Note, *Pretrial Discovery in Condemnation Proceedings: An Evaluation*, 42 ST. JOHNS L. REV. 52, 56-69 (1967).

<sup>57</sup> See cases cited note 38 *supra*.

<sup>58</sup> Dolan, *Federal Condemnation Practice—General Aspects*, 27 APPRAISAL J. 15, 19 (1959).

<sup>59</sup> Wright, *Discovery*, 35 F.R.D. 39, 57 (1964).

<sup>60</sup> *Id.* at 57 n.56.

<sup>61</sup> Friedenthal, *supra* note 47, at 473 ("It is impossible to justify such a distinction"); Long, *Discovery*, *supra* note 47, at 144-45 ("The distinction between fact and opinion is particularly without merit when we are concerned with experts").

<sup>62</sup> *United States v. 7,534.04 Acres of Land*, 18 F.R.D. 146 (N.D. Ga. 1954); see *United States v. Certain Acres of Land*, 18 F.R.D. 98, 101 (N.D. Ga. 1955).

<sup>63</sup> *United States v. 6.82 Acres of Land*, 18 F.R.D. 195, 197 (D.N.M. 1955); see *United States v. 4,724 Acres of Land*, 31 F.R.D. 290, 292 (E.D. La. 1962).

<sup>64</sup> Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1038 (1961).

<sup>65</sup> Dolan, *Federal Condemnation Practice—General Aspects*, 27 APPRAISAL J. 15, 19 (1959).

One answer to this theory of availability is given in a recent case<sup>66</sup> that emphasizes the subjective nature of expert opinions. Such an opinion cannot be classified as "available" since it is obtainable only from the person holding it, namely the expert.<sup>67</sup> Or, as the court in *United States v. Meyer* expressed it:

The appraisers' opinions and their factual and theoretical foundation are peculiarly within the knowledge of each appraiser and, to a degree, that of the party who employed him. The opposing party can obtain this information in advance of trial only by discovery. . . .<sup>68</sup>

Another answer to the theory of availability is that a party seldom desires just to "learn" about information of the opposition. Rather, a party wishes to know, through discovery, the use to which this information will, or has been, put.<sup>69</sup>

The third argument for denying discovery of expert opinions is that to allow such discovery would be to violate the attorney-client privilege. In one quite ingenious case,<sup>70</sup> a non-condemnation action, it was successfully argued that a neurologist-psychiatrist who examined the party to the suit at the request of that party's attorney was no more than a messenger through which the party communicated to his attorney. The information communicated, therefore, was held to be protected by the attorney-client privilege.<sup>71</sup> The general rule, however, is that the attorney-client privilege will not protect knowledge of a third party but only the communication between an individual and his professional legal advisor;<sup>72</sup> and as one writer explains, the expert is clearly not a professional legal advisor, nor is he a transmission agent between the client and the attorney. His knowledge, therefore, should not be protected by the attorney-client privilege.<sup>73</sup> The trend in the federal courts<sup>74</sup> is now toward the exclusion of the expert from the protection of the attorney-client privilege.<sup>75</sup>

The fourth argument against discovery of expert opinion, the one that has probably caused the most difficulty, is often labeled the rule of *Hickman v. Taylor*.<sup>76</sup> According to *Hickman*, an attorney's "work product" should be given a qualified immunity from discovery procedures "in order to preserve the lawyer's independence and thus in-

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<sup>66</sup> *United States v. 23.76 Acres of Land*, 32 F.R.D. 593 (D. Md. 1963).

<sup>67</sup> *Id.* at 596.

<sup>68</sup> *United States v. Meyer*, 398 F.2d 66, 69 (9th Cir. 1968).

<sup>69</sup> Long, *Discovery*, *supra* note 47, at 128.

<sup>70</sup> *San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951).

<sup>71</sup> *Id.* at 237, 231 P.2d at 31.

<sup>72</sup> Note, *Discovery of Expert Opinion in Land Condemnation Proceedings*, 41 IND L.J. 506, 507 (1966).

<sup>73</sup> Gardner, *Agency Problems in the Law of Attorney-Client Privilege: The Expert Witness*, 42 U. DE. L.J. 473, 478 (1965) [hereinafter cited as Gardner, *The Expert Witness*].

<sup>74</sup> *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 596 (D. Md. 1963).

<sup>75</sup> See, e.g., *United States v. Meyer*, 398 F.2d 66, 73 (9th Cir. 1968).

<sup>76</sup> 329 U.S. 495 (1947); see, e.g., Wright, *Discovery*, 35 F.R.D. 39, 46 (1964).

directly, the adversary system."<sup>77</sup> The materials sought through discovery in *Hickman*<sup>78</sup> were statements obtained personally by an attorney in his trial preparations. The "work product" rule, however, was extended in *Alltont v. United States*<sup>79</sup> to bar discovery of information obtained by an agent of the attorney.

The question, therefore, is whether the facts gathered by the adverse party's prospective expert appraiser, or his appraisal report, are within the "work product" doctrine. The better reasoned answer is that such information is not within the protection of the "work product" doctrine.<sup>80</sup> Two recent federal condemnation cases<sup>81</sup> have said, in effect, that even if the information gathered by an expert for an attorney is within the "work product" privilege, the privilege is merely a qualified one, not an absolute one, and the good cause that is necessary to discover material so privileged is provided by the very nature of a condemnation action.<sup>82</sup>

The final traditional argument, found in the "more modern and better reasoned cases,"<sup>83</sup> was first stated in *Lewis v. United Airlines Transport Corp.*<sup>84</sup> *Lewis* reasoned that to permit one party to use another's expert opinion is unfair, especially since the latter party has paid the full expense of obtaining the information. Allowing discovery here would be substantially a taking of the opponent's property without just compensation.<sup>85</sup> Rebuttal to this reasoning is simple: the court can condition discovery upon the moving party's willingness to pay a reasonable portion of the expert's fee and upon agreement to mutual discovery.<sup>86</sup> Such conditional discovery is in the

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<sup>77</sup> 2A BARRON & HOLTZOFF, *supra* note 52, § 652.2, at 131.

<sup>78</sup> 329 U.S. 495 (1947).

<sup>79</sup> 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

<sup>80</sup> 2A BARRON & HOLTZOFF, *supra* note 52, § 652.2, at 131; 6 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 26.22, at 259 (3d ed. 1965); Gardner, *The Expert Witness*, *supra* note 73, at 500-01; Friedenthal, *supra* note 47, at 479-80; Comment, *Discovery—The Work Product Protection*, 13 KAN. L. REV. 125, 128 (1964); 10 N.Y.L.F. 574, 577-78 (1964).

<sup>81</sup> *United States v. 3595.98 Acres of Land*, 212 F. Supp. 617, 618 (N.D. Cal. 1962); *United States v. Certain Parcels of Land*, 15 F.R.D. 224, 236 (S.D. Cal. 1953).

<sup>82</sup> *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 414-15 (N.D. Cal. 1965), *aff'd as modified sub nom.* *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968); *see United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 596-97 (D. Md. 1963).

<sup>83</sup> *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D. Md. 1963).

<sup>84</sup> 32 F. Supp. 21 (D. Pa. 1940).

<sup>85</sup> *United States v. Certain Acres of Land*, 18 F.R.D. 98, 100 (M.D. Ga. 1955); *see United States v. 6.82 Acres of Land*, 18 F.R.D. 195, 197 (D.N.M. 1955). *See generally* Friedenthal, *supra* note 47, at 482-83; von Kalinowski, *Use of Discovery Against the Expert Witness*, 40 F.R.D. 43, 50-51 (1967).

<sup>86</sup> *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 415 (N.D. Cal. 1965), *aff'd as modified sub nom.* *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968); *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D. Md. 1963); *United States v. 50.34 Acres of Land*, 13 F.R.D. 19, 21 (E.D.N.Y. 1952).

proposed amendments to the Federal Rules of Civil Procedure.<sup>87</sup>

### C. *United States v. Meyer*—Complete Discovery

Considering the variety of pretrial practices utilized by the federal district courts, the recent case of *United States v. Meyer*<sup>88</sup> is important for two reasons. First, it is the only decision of a United States Court of Appeals on the discoverability of appraiser's opinions and reports in a condemnation action. Second, and more important, it applies the doctrine of complete discovery, including final opinions or conclusions of an expert appraiser in a condemnation action.<sup>89</sup> While some writers<sup>90</sup> and courts<sup>91</sup> have contended that earlier condemnation decisions<sup>92</sup> had allowed discovery of the final opinions<sup>93</sup> or conclusions<sup>94</sup> of appraisal experts, this contention is not well-founded.<sup>95</sup>

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<sup>87</sup> Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts relating to Deposition and Discovery*, 43 F.R.D. 211, 226 (1968) (Proposed Rule 26(b) (4) (c) [hereinafter cited as *Proposed Amendments to Civil Rules*].

<sup>88</sup> 398 F.2d 66 (9th Cir. 1968).

<sup>89</sup> *Id.* at 69.

<sup>90</sup> Long, *Discovery*, *supra* note 47, at 117 n.44; Note, *Pretrial Discovery in Condemnation Proceedings: An Evaluation*, 42 ST. JOHNS L. REV. 52, 56 n.23 (1967).

<sup>91</sup> *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 413 (N.D. Cal. 1965), *aff'd as modified sub nom. United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968); *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 595-96 (D. Md. 1963).

<sup>92</sup> *United States v. 23.76 Acres of Land*, 32 F.R.D. 593 (D. Md. 1963); *United States v. 3595.98 Acres of Land*, 212 F. Supp. 617 (N.D. Cal. 1962); *United States v. 60.50 Acres of Land*, 23 F.R.D. 287 (N.D. Ohio 1959); *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953); *United States v. 50.34 Acres of Land*, 13 F.R.D. 19 (E.D.N.Y. 1952); *United States v. 1,278.83 Acres of Land*, 12 F.R.D. 320 (D. Va. 1952).

<sup>93</sup> *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 413 (N.D. Cal. 1965).

<sup>94</sup> Note, *Pretrial Discovery in Condemnation Proceedings: An Evaluation*, 42 ST. JOHNS L. REV. 52, 56 n.23 (1967).

<sup>95</sup> *United States v. 23.76 Acres of Land*, 32 F.R.D. 593 (D. Md. 1963), comes closest to allowing complete discovery. However, the opinion of the court specifically states that the interrogatories fell short of asking the expert to state his ultimate conclusions about the value of the property. *United States v. 3,595.98 Acres of Land*, 212 F. Supp. 617 (N.D. Cal. 1962), allows the exchange of comparable sales data without an inquiry into matters of opinion or work product. *United States v. 62.50 Acres of Land*, 23 F.R.D. 287 (N.D. Ohio 1959), permitted interrogatories about the existence of documents supplied to the appraisers by the government. This discovery is of the existence of the documents and not the contents. Also note that the documents were those of the government and not of the appraisers. *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953), stated that the opinions are and will remain wholly incompetent and immaterial as evidence unless and until the appraisers are called as witnesses at trial. Therefore, pretrial discovery of opinions was denied. *United States v. 50.34 Acres of Land*, 13 F.R.D. 19 (E.D.N.Y. 1952), allowed discovery of the appraisal

In *United States v. Meyer*, the condemnee issued notices for taking depositions of the government's<sup>96</sup> three real estate appraisers.<sup>97</sup> The appraisers appeared at the time and place stated in the deposition request, but would testify only to the fact that they had been employed by the government and that they had received remuneration for such employment.<sup>98</sup> The government sought a protective order<sup>99</sup> to prevent much of the interrogation,<sup>100</sup> which was denied by the lower court.<sup>101</sup> On appeal, Judge Browning succinctly disposed of the government's arguments. Concerning the proposition that the information was mutually available, the court said that the vital information sought was not available from other sources. The condemnee sought to discover the opinions of the government's appraisers and the basis upon which these opinions rested. This information could only be obtained from the appraisers themselves.<sup>102</sup>

In reply to the government's contention of a distinction between facts and opinions, the court held that there is no fact-opinion distinction in the Federal Rules. "Rule 26(b) extends discovery broadly to 'any matter not privileged, which is relevant to the subject matter, involved in the pending action.'"<sup>103</sup> This conclusion eliminating the distinction between fact and opinion has been considered the better view,<sup>104</sup> particularly where experts are concerned.<sup>105</sup>

Finally, the government contended that the information was immune from discovery under the "work product" doctrine. After noting the *Hickman* rule<sup>106</sup> and the *Allmont* extension,<sup>107</sup> Judge Brown-

report in the first hearing. However, in the later hearing to determine the permissible scope of the discovery, the court limited the discovery to facts and comparable sales and denied access to opinions. *United States v. 50.34 Acres of Land*, 12 F.R.D. 440, 441 (E.D.N.Y. 1952). *United States v. 1,278.83 Acres of Land*, 12 F.R.D. 320 (D. Va. 1952), held some opinions discoverable, but these opinions were in no way concerned with the appraiser's valuations.

<sup>96</sup> In this case the federal government was the condemnor. It is possible for a private individual or corporation or a quasi-public corporation, rather than the local, state or federal government, to be the condemnor in a condemnation action.

<sup>97</sup> The condemnee sought to take the depositions under Rule 26 of the Federal Rules of Civil Procedure.

<sup>98</sup> *United States v. Meyer*, 398 F.2d 66, 68 (9th Cir. 1968).

<sup>99</sup> The government sought the protective order under Rule 30(b) of the Federal Rules of Civil Procedure.

<sup>100</sup> *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 412 (N.D. Cal. 1965), *aff'd as modified sub nom.* *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968).

<sup>101</sup> *Id.* at 416.

<sup>102</sup> *United States v. Meyer*, 398 F.2d 66, 72 (9th Cir. 1968).

<sup>103</sup> *Id.* at 73.

<sup>104</sup> 4 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 26.16[4], at 1195.

<sup>105</sup> Long, *Discovery*, *supra* note 47, at 144-45.

<sup>106</sup> *Hickman v. Taylor*, 329 U.S. 495 (1947).

<sup>107</sup> *Allmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

ing excluded appraisers from the "work product" privilege:

Ordinarily, appraisers are not employed in condemnation matters to act as advisors to counsel . . . [They are] usually employed to furnish expert opinions as to the value of the property taken. The appraisers' opinions and the data and analysis upon which they rest are interdependent elements which together constitute the product of the appraisers' expertise. They do not become work product of the attorneys merely because the attorneys confer and counsel with the appraisers; they are not immunized from discovery merely because the appraisers may have set them out in reports to counsel.<sup>108</sup>

Having disposed of the traditional arguments, the court then proceeded to the argument raised in more recent cases,<sup>109</sup> that of unfairness. The court first answered this argument by explaining that "the courts have broad power to control the timing of discovery [and] limit its scope."<sup>110</sup> The court then stated conditions that if placed on discovery, would avoid any unfairness—namely, the payment of a reasonable share of the expenses involved, and the assurance that discovery will be reciprocal.<sup>111</sup>

Finally, the *Meyer* court justified discovery of expert opinion from a practical standpoint:

Because land appraisal is complex and technical, usually evidence on the issue of value consists principally of the opinions of opposing experts. These opinions are notoriously disparate. The weight to which an appraiser's opinion testimony is entitled turns upon the validity of the appraiser's premises, procedures, and theories; the soundness of his factual determinations; the comparisons he has made; the methods he has followed, and the formulae he has applied. Basically, the trial of a condemnation suit consists of the admission into evidence of the opinions of the opposing appraisers and the factual and theoretical bases upon which they rest, and the testing of those opinions by cross-examination and rebuttal.

. . . Since this material will constitute the substance of the trial, pretrial disclosure is necessary if the parties are to fairly evaluate their respective claims for settlement purposes, determine the real areas of dispute, narrow the actual issues, avoid surprise, and prepare adequately for cross-examination and rebuttal.<sup>112</sup>

*United States v. Meyer* was the first federal case to permit such complete discovery of expert conclusions in a condemnation action, but the case is not without support from at least two sources: other case law and proposed Federal Rules amendments.<sup>113</sup>

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<sup>108</sup> *United States v. Meyer*, 398 F.2d 66, 74 (9th Cir. 1968).

<sup>109</sup> See, e.g., *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D. Md. 1963).

<sup>110</sup> *United States v. Meyer*, 398 F.2d 66, 75 (9th Cir. 1968).

<sup>111</sup> *Id.* at 75-76. For application of such conditions, see *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D. Md. 1963); *United States v. 50.34 Acres of Land*, 13 F.R.D. 19, 21 (E.D.N.Y. 1952).

<sup>112</sup> *United States v. Meyer*, 398 F.2d 66, 69 (9th Cir. 1968).

<sup>113</sup> Other supporting material is found in the court's footnotes. See *id.* at 70 n.4.

## 1. Case Authority

Support for the *Meyer* holding can be found outside the field of eminent domain. While there are cases that have denied discovery<sup>114</sup> or have limited it to factual information,<sup>115</sup> there are a great number of decisions that have extended discovery to opinions<sup>116</sup> and to conclusions<sup>117</sup> of experts employed by the adverse party. Most important is the large number of very recent cases that have extended discovery to include the expert's ultimate opinions.<sup>118</sup> The remaining requirement most common in such cases, evidently created in accordance with the policy of Rule 1 of the Federal Rules,<sup>119</sup> is that such discovery substantially served the purpose of leading to the issues and of expediting the law suit.<sup>120</sup> This more relaxed discovery practice has found support with several writers,<sup>121</sup> and the trend is definitely toward the more liberal discovery rules.<sup>122</sup>

## 2. Proposed Amendments

Another support for the extension of the discovery process is

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<sup>114</sup> *Smith v. Hobart Mfg. Co.*, 188 F. Supp. 135, 136 (E.D. Pa. 1960); *Robertson v. Graham Corp.*, 14 F.R.D. 83, 84 (D. Mass. 1952).

<sup>115</sup> *Hoagland v. TVA*, 34 F.R.D. 458, 460 (E.D. Tenn. 1963); *Maginnis v. Westinghouse Elec. Corp.*, 207 F. Supp. 739, 742 (E.D. La. 1962); *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376, 378 (D.N.J. 1954).

<sup>116</sup> *United States v. McKay*, 372 F.2d 174 (5th Cir. 1967); *Seven-Up Bottling Co. v. United States*, 39 F.R.D. 1, 2 (D. Colo. 1966); *United States v. 38 Cases*, 35 F.R.D. 357, 362 (W.D. Pa. 1964); *Henlopen Hotel Corp. v. Aetna Ins. Co.*, 33 F.R.D. 306, 308 (D. Del. 1963); *United States v. Nysco Labs. Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y. 1960), *aff'd*, 318 F.2d 817 (2d Cir. 1963).

<sup>117</sup> *Luey v. Sterling Drug, Inc.*, 240 F. Supp. 632, 636 (W.D. Mich. 1965); *Stonybrook Tenants Ass'n v. Alpert*, 29 F.R.D. 165, 168 (D. Conn. 1961); *United Air Lines, Inc. v. United States*, 26 F.R.D. 213, 217 (D. Del. 1960); *Broadway & Ninety-Sixth St. Realty Co. v. Loews, Inc.*, 21 F.R.D. 347, 359-60 (S.D.N.Y. 1958).

<sup>118</sup> *Empire Scientific Corp. v. Pickering & Co.*, 44 F.R.D. 5, 6-7 (E.D.N.Y. 1968); *Besly-Welles Corp. v. Balax, Inc.*, 43 F.R.D. 368, 372-73 (D. Wis. 1968); *Technograph, Inc. v. Texas Instruments, Inc.*, 43 F.R.D. 416, 418 (S.D.N.Y. 1967); *Diversified Prods. Corp. v. Sports Center*, 42 F.R.D. 3, 4-5 (D. Md. 1967); *Federal Cartridge Corp. v. Olin Mathieson Chem. Corp.*, 41 F.R.D. 531, 534-35 (D. Minn. 1967).

<sup>119</sup> Rule 1 of the Federal Rules of Civil Procedure states: "[The Rules] shall be construed to secure the just, speedy and inexpensive determination of every action."

<sup>120</sup> *Kerr-McGee Corp. v. Texas Okla. Express Inc.*, 43 F.R.D. 336, 338 (D. Okla. 1967); *Luey v. Sterling Drug, Inc.*, 240 F. Supp. 632, 636 (W.D. Mich. 1965); see *Stonybrook Tenants Ass'n v. Alpert*, 29 F.R.D. 165, 168 (D. Conn. 1961).

<sup>121</sup> 7 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 71A.20[3], at 2767; Gardner, *The Expert Witness*, *supra* note 73, at 500-01; Winner, *Procedural Methods to Attain Discovery*, 28 F.R.D. 97, 101-03 (1962); 39 NOTRE DAME LAW. 96, 100 (1963).

<sup>122</sup> Goldstein, *The Discovery Process in Highway Land Acquisition*, 14 AM. U.L. REV. 38, 67-69 (1964).

found in the most recent draft of the proposed amendments to the Federal Rules.<sup>123</sup> Under these proposals, a party would be able to discover those experts that his opponent expects to call at trial, and the subject matter upon which each expert will testify. The party could then discover from the experts facts known and opinions held that are relevant to the stated subject matter. These proposed amendments had a definite effect on the decision of the court in *United States v. Meyer*<sup>124</sup> and should have a substantial effect on future decisions.

#### D. Expert—Advisor or Witness—An Important Distinction

One aspect of the expert problem, noted in *United States v. Meyer*,<sup>125</sup> that is very often overlooked is the fact that the expert can serve in two separate capacities. He may be requested to advise counsel on matters pertaining to trial preparation, including the question of whether the situation merits litigation at all, or he may be employed to prepare and give expert testimony at trial. In the most common situation, the expert is probably retained to serve in both capacities.<sup>126</sup> Although appraisers are not ordinarily employed to act exclusively as advisors to counsel,<sup>127</sup> it is a very possible situation,<sup>128</sup> and thus the distinction merits attention.

The *Hickman* case<sup>129</sup> reasoned that the proper preparation of a client's case demands that the attorney be allowed to prepare his legal theories and to plan his strategy without undue interference.<sup>130</sup> This includes the right to investigate the subject thoroughly without the fear of uncovering unfavorable evidence that could then be obtained by the opponent. This is the rationale behind a recent California condemnation decision:<sup>131</sup> "[A]n attorney should be allowed to prepare his case thoroughly and 'to investigate not only the favorable but the unfavorable aspects of such cases. . . .'"<sup>132</sup> If the information discovered by such an expert investigator or advisor were not privileged, then every probe could be the step that later proves fatal to the proponent's case.

The situation is different in the case of an expert who is retained as a witness. The protection of his opinions from discovery can defeat the purpose of the deposition-discovery procedure. In discussing cases that present intricate and difficult issues in which expert testimony

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<sup>123</sup> *Proposed Amendments to Civil Rules*, *supra* note 87.

<sup>124</sup> 398 F.2d 66 (9th Cir. 1968).

<sup>125</sup> *Id.*

<sup>126</sup> *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 202, 41 Cal. Rptr. 721, 726 (1964).

<sup>127</sup> *United States v. Meyer*, 398 F.2d 66, 74 (9th Cir. 1968).

<sup>128</sup> *See, e.g., Mack v. Superior Court*, 259 A.C.A. 1, 66 Cal Rptr. 280 (1968).

<sup>129</sup> *Hickman v. Taylor*, 329 U.S. 495 (1947).

<sup>130</sup> *Id.* at 511.

<sup>131</sup> *Mack v. Superior Court*, 259 A.C.A. 1, 66 Cal Rptr. 280 (1968).

<sup>132</sup> *Id.* at 5, 66 Cal Rptr. at 283.



is likely to be determinative (such as the issue of valuation in an eminent domain action), one writer explains:

In cases of this character, a prohibition against discovery of information held by witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer, even with the help of his own experts, frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his testimony on the stand.<sup>133</sup>

The recent proposed amendments to the Federal Rules meet this problem directly by a rewriting of Rule 26<sup>134</sup> to include a distinction between an "expert retained or specially employed by another party in anticipation of litigation or preparation for trial,"<sup>135</sup> and an expert expected to be called "as an expert witness at trial."<sup>136</sup> The amendment would set a stricter standard for discovery of materials prepared by, or opinions held by, an expert who is not a prospective witness. This would not be an absolute privilege, but a qualified privilege:

[A] party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon the showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.<sup>137</sup>

This provision repudiates<sup>138</sup> the idea that an "expert's information is privileged simply because of his status as an expert."<sup>139</sup> It also attempts to avoid the "work product" doctrine advanced by some courts,<sup>140</sup> preferring to adopt the more recent test<sup>141</sup> of fairness.<sup>142</sup> While this concept of qualified privilege is not new,<sup>143</sup> it is made more effective by dividing the experts into witness and non-witness groupings. If the expert is classified as a non-witness, discovery would be permitted under the proposed amendment only if the party seeking discovery is unable to obtain the information he needs from his own expert.<sup>144</sup>

On the other hand, the proposed amendment would allow more freedom of discovery in the case of experts who will be called at

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<sup>133</sup> *Proposed Amendments to Civil Rules*, *supra* note 87, at 234.

<sup>134</sup> *Id.* at 224-28.

<sup>135</sup> *Id.* at 225 (Proposed Rule 26(b)(4)(A)).

<sup>136</sup> *Id.* at 225-26 (Proposed Rule 26(b)(4)(B)).

<sup>137</sup> *Id.* at 225.

<sup>138</sup> *Id.* at 233.

<sup>139</sup> *Armstrong, Report*, *supra* note 8, at 356.

<sup>140</sup> *See, e.g., Mack v. Superior Court*, 259 A.C.A. 1, 3, 66 Cal. Rptr. 280, 282-83 (1968).

<sup>141</sup> *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 597 (D. Md. 1963).

<sup>142</sup> *Proposed Amendments to Civil Rules*, *supra* note 87, at 233.

<sup>143</sup> *See 4 MOORE'S FEDERAL PRACTICE*, *supra* note 6, ¶ 26.24, where this concept of qualified privilege is traced back to *Hickman*.

<sup>144</sup> *Proposed Amendments to Civil Rules*, *supra* note 87, at 233-34.

trial. Under the proposed change, a party, by means of interrogatories, could require the opponent to identify the party or parties whom he expects to call as expert witnesses at trial and the subject matter on which each of the experts is expected to testify.<sup>145</sup> The party could then "discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter."<sup>146</sup> This proposal is intended to solve the problems that appear in cases presenting intricate and difficult issues likely to be decided by expert testimony, such as "food and drug, patent and condemnation cases."<sup>147</sup> In these cases, discovery of expert witnesses is needed for effective cross-examination and rebuttal, and yet discovery is often denied.<sup>148</sup>

There are two areas in which difficulties could arise under the proposed amendments to the Federal Rules. First, since this discovery is limited to trial witnesses, a party cannot discover the information of the opponent's experts until that attorney has decided who will actually be a witness at trial. The opponent might conveniently suffer from acute indecision until the last possible moment and thereby circumvent the purpose of the discovery provisions. This, however, could easily be avoided by establishing a deadline for the selection of such expert witnesses. Then, expert witnesses not identified in a response to an interrogatory, on or after the established date, could not be called at trial, unless good cause is shown for the late selection.<sup>149</sup>

The second possible problem may arise from the following proposed provision: "Discovery of the expert's opinions and the grounds therefor is restricted to those previously given or those to be given on direct examination at trial."<sup>150</sup> This provision is not crystal clear and could result in a controversy requiring too much interpretation on the part of the federal district courts concerning the scope of discovery. What exactly does "previously given" mean? If continuity is to be retained, the phrase means previously given on direct examination at trial. If this interpretation is correct, then the phrase is completely otiose and should be eliminated to avoid unnecessary confusion. Information previously given at trial should be acquired through a court transcript to avoid unnecessary work on the part of

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<sup>145</sup> *Id.* at 225 (Proposed Rule 26(b)(4)(B)(i)).

<sup>146</sup> *Id.* at 225-26.

<sup>147</sup> *Id.* at 234 (emphasis added).

<sup>148</sup> See cases cited notes 35-42 *supra*.

<sup>149</sup> This practice recently has been codified in California to provide for exchange of information in eminent domain proceedings. The code requires the exchange of lists of experts and the subject matter of their testimony. CAL. CODE CIV. PROC. § 1272.046. Teeth have been added by providing that an expert must be on the list, or have a good reason why he is not on the list, or he will not be allowed to testify. *Id.* § 1272.05-.06.

<sup>150</sup> Proposed Rule 26(b)(4)(B)(ii). *Proposed Amendments to Civil Rules*, *supra* note 87, at 225-26.

the opponent's expert and to provide an exact statement of opinion given at the trial.

The other phrase—"to be given on direct examination at trial"—should present no difficult problem since the proposed amendment requires a party, upon request, "to state the subject matter upon which the expert is expected to testify."<sup>151</sup>

The consequences of distinguishing between an expert advisor and an expert witness are illustrated by two recent decisions.<sup>152</sup> In *United States v. Meyer*,<sup>153</sup> the appraisers were found to be potential witnesses, and the court reasoned that their opinions and the facts and theories supporting their opinions were admissible in evidence at the trial. Since such material "can be obtained only from the appraisers themselves, [this information] should be discoverable if the purposes of the Federal Rules are to be effectuated."<sup>154</sup> In *Mack v. Superior Court*,<sup>155</sup> the information of the appraiser was obtained exclusively for the opponent's attorney to aid him in preparing his case, and the appraiser was not to be called as a witness during the trial. The court reasoned that information concerning the expert and his opinions was not discoverable in the absence of evidence that such denial would result in unfair prejudice to the party seeking discovery.<sup>156</sup>

The adoption of a policy distinguishing between witness and non-witness experts would allow discovery where it is most needed and curtail it where it is most likely to be harmful. By far the most lucid reasoning was given in the California case of *Swartzman v. Superior Court*:<sup>157</sup>

[T]he expert normally wears two hats. He is employed by counsel to form an opinion which he may later present as a witness in court. He is also engaged as an adviser on trial preparation and tactics for the case and in this latter capacity serves as a professional consultant to counsel on the technical and forensic aspects of his speciality.<sup>158</sup>

Concerning the expert as an advisor and professional consultant the court explained that the expert's freedom to advise counsel and to educate him on the technical problems of the case "without hindrance from the opposing side, are important elements of counsel's privacy of preparation."<sup>159</sup> However, the court concluded that this protection should not be allowed to defeat the purpose of the liberal discovery procedures:

When it becomes reasonably certain that an expert will give his pro-

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<sup>151</sup> *Id.* at 225.

<sup>152</sup> *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968); *Mack v. Superior Court*, 259 A.C.A. 1, 66 Cal. Rptr. 280 (1968).

<sup>153</sup> 398 F.2d 66 (9th Cir. 1968).

<sup>154</sup> *Id.* at 74.

<sup>155</sup> 259 A.C.A. 1, 66 Cal. Rptr. 280 (1968).

<sup>156</sup> *Id.* at 5, 66 Cal. Rptr. at 283.

<sup>157</sup> 231 Cal. App. 2d 195, 41 Cal. Rptr. 721 (1964).

<sup>158</sup> *Id.* at 202, 41 Cal. Rptr. at 726.

<sup>159</sup> *Id.* at 202, 41 Cal. Rptr. at 726-27.

fessional opinion as a witness on a material matter in dispute, then his opinion has become a factor in the cause. At that point the expert has ceased to be merely a consultant and has become a counter in the litigation, one to be evaluated with others. Such evaluation properly includes appropriate pretrial discovery.<sup>160</sup>

### E. Agent-Employee vs. Independent Appraiser

There is one final distinction that deserves brief mention. Some courts proclaim a distinction between an appraiser who is an actual employee of the condemnor, and an independent appraiser that has been hired to form a valuation of the *locus in quo* [land in question].<sup>161</sup> The distinction rests upon basic agency principles. The act of an agent is the act of the principal if done with the authority of the principal and within the scope of the agency relationship.<sup>162</sup> Based upon this theory, a communication otherwise privileged does not lose this privileged character merely because it was obtained by an employee of the client and conveyed by this employee to the attorney, so long as it was communicated with the employer's knowledge and within the scope of the employee's authority.<sup>163</sup>

To enjoy a privileged status, however, the communication must emanate from the client, and not from his advisor.<sup>164</sup> In *Oceanside Union School District v. Superior Court*,<sup>165</sup> the report of an independent appraiser was held to be discoverable.<sup>166</sup> In *People ex rel. Department of Public Works v. Glen Arms Estate*,<sup>167</sup> an appraisal report of an employee of the California State Division of Highways was ruled the report of his employer; and since it was prepared for transmission to the attorney and was intended to be confidential, it was held to be within the attorney-client privilege.<sup>168</sup>

## III. California—Discovery in Eminent Domain

The problem of the discoverability of experts in the area of eminent domain is comparatively new in California. In fact, "discovery was practically unused in condemnation proceedings before 1957."<sup>169</sup> Prior to that date, effort to take depositions were usually

<sup>160</sup> *Id.* at 203, 41 Cal. Rptr. at 727.

<sup>161</sup> Compare *People ex rel. Department of Pub. Works v. Glen Arms Estate, Inc.*, 230 Cal. App. 2d 841, 41 Cal. Rptr. 303 (1964), with *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 373 P.2d 439, 23 Cal. Rptr. 375 (1962).

<sup>162</sup> See generally W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* (1964).

<sup>163</sup> *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 737, 388 P.2d 700, 710, 36 Cal. Rptr. 468, 478 (1964).

<sup>164</sup> See, e.g., *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 188, 373 P.2d 439, 444, 23 Cal. Rptr. 375, 380 (1962).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> 230 Cal. App. 2d 841, 41 Cal. Rptr. 303 (1964).

<sup>168</sup> *Id.* at 857, 41 Cal. Rptr. at 312.

<sup>169</sup> Huxtable, *Trial Preparation, Discovery, Pretrial, and Jury Instruc-*

unsuccessful when resisted by the opponent.<sup>170</sup> The California statute then in effect<sup>171</sup> provided that the attorney-client privilege "encompassed all reports compiled by agents in anticipation of litigation,"<sup>172</sup> and the state bar had insisted that "all trial preparations of an attorney were absolutely protected from discovery."<sup>173</sup> In 1957 the legislature added new sections to the Code of Civil Procedure,<sup>174</sup> substantially adopting the discovery mechanism of Federal Rules 26 through 37.<sup>175</sup>

The first test of the new code provisions in a condemnation proceeding came in *Rust v. Roberts*,<sup>176</sup> in which the condemnees, through interrogatories, requested the names and addresses of the appraisers and the contents of the appraisers' reports.<sup>177</sup> The court accepted the State's claim that, since the attorneys for the State requested it to employ appraisers to investigate, appraise and report, and since the report was delivered to the attorney in confidence, the report was privileged from discovery under section 2016(b) of the Code of Civil Procedure.<sup>178</sup> The court held that the report of an expert was within the attorney-client privilege simply because it was prepared by an expert in anticipation of trial.<sup>179</sup>

In commenting on this decision, one writer explained that "[i]f the *Rust* rule is followed, interrogatories will have little value in condemnation cases . . . ."<sup>180</sup> However, within a year *Grandlake Drive-In, Inc. v. Superior Court*<sup>181</sup> initiated a series of decisions that narrowed the scope of the privilege given in *Rust*. The state court of appeal in *Grandlake* held that an expert's opinion was not privileged merely because it had been communicated to an attorney.<sup>182</sup> In *Mowry v. Superior Court*,<sup>183</sup> the court of appeal explained that pretrial discovery could be obtained from the condemnor's expert upon the showing of good cause, although it did not abrogate the rule that the appraiser's reports were within the attorney-client privilege.<sup>184</sup> Thus,

tions, in CALIFORNIA CONDEMNATION PRACTICE § 12.23, at 241 (Cal. Cont. Educ. Bar ed. 1960).

<sup>170</sup> *Id.*

<sup>171</sup> CAL. CODE CIV. PROC. § 1881(2).

<sup>172</sup> Comment, *California Discovery Since Greyhound: Good Cause for Reflection*, 10 U.C.L.A.L. REV. 593, 595 (1963).

<sup>173</sup> *Id.* at 607.

<sup>174</sup> CAL. CODE CIV. PROC. §§ 2016-2035.

<sup>175</sup> Louisell, *Discovery Today*, 45 CALIF. L. REV. 486 (1957).

<sup>176</sup> 171 Cal. App. 2d 772, 341 P.2d 46 (1959).

<sup>177</sup> See *id.* at 774-75, 341 P.2d at 48 (Interrogatories six through ten).

<sup>178</sup> *Id.* at 776, 341 P.2d at 49.

<sup>179</sup> *Id.* at 777, 341 P.2d at 49-50.

<sup>180</sup> Huxtable, *Trial Preparation, Discovery, Pretrial, and Jury Instructions*, in CALIFORNIA CONDEMNATION PRACTICE § 12.26, at 244 (Cal. Cont. Educ. Bar ed. 1960).

<sup>181</sup> 179 Cal. App. 2d 122, 3 Cal. Rptr. 621 (1960).

<sup>182</sup> *Id.* at 127, 3 Cal. Rptr. at 625-26.

<sup>183</sup> 202 Cal. App. 2d 229, 20 Cal. Rptr. 698 (1962).

<sup>184</sup> *Id.* at 241, 20 Cal. Rptr. at 706.

while the condemnee could not discover the report itself, he was not precluded from questioning the appraiser regarding his opinions concerning the value of the land and other related matters.

In *People ex rel. Department of Public Works v. Donovan*,<sup>185</sup> the California Supreme Court reversed the trial court's finding that the *knowledge* possessed by an expert was within the attorney-client privilege.<sup>186</sup> The opinion stated that such knowledge is privileged only when it is acquired by an expert while acting as an agent of transmission between client and attorney.<sup>187</sup>

The final overthrow of the attorney-client privilege for experts in California came in three cases decided by the California Supreme Court.<sup>188</sup> In the first case,<sup>189</sup> a condemnation action, the court held that the opinions of real estate appraisers concerning the value of the property were not within the attorney-client privilege and thus were not protected from pretrial discovery on that ground.<sup>190</sup> In the second decision, following a request for the discovery of an architect's valuation, the court expressly disapproved those portions of *Mowry v. Superior Court*<sup>191</sup> and *Rust v. Roberts*<sup>192</sup> that declared the report of an expert real estate appraiser made to an attorney to be privileged as a matter of law.<sup>193</sup> In the third decision, movies taken by an independent investigator in anticipation of litigation were held not to be within the attorney-client privilege.<sup>194</sup> Moreover, since an earlier California Supreme Court decision had held that the federal "work product" privilege did not exist in California,<sup>195</sup> the three cases reasoned that a claim of "work product" was merely one factor to be considered by the trial court in the exercise of its discretion in determining whether discovery should be granted.<sup>196</sup>

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<sup>185</sup> 57 Cal. 2d 346, 369 P.2d 1, 19 Cal. Rptr. 473 (1962).

<sup>186</sup> *Id.* at 355, 369 P.2d at 5-6, 19 Cal. Rptr. at 477.

<sup>187</sup> *Id.* at 354, 369 P.2d at 5, 19 Cal. Rptr. at 477. For an example of an expert as a conduit, see *San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951).

<sup>188</sup> *Suezaki v. Superior Court*, 58 Cal. 2d 166, 373 P.2d 432, 23 Cal. Rptr. 368 (1962); *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 373 P.2d 439, 23 Cal. Rptr. 375 (1962); *San Diego Professional Ass'n v. Superior Court*, 58 Cal. 2d 194, 373 P.2d 448, 23 Cal. Rptr. 384 (1962).

<sup>189</sup> *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 373 P.2d 439, 23 Cal. Rptr. 375 (1962).

<sup>190</sup> *Id.* at 188, 373 P.2d at 444, 23 Cal. Rptr. at 380.

<sup>191</sup> 202 Cal. App. 2d 229, 20 Cal. Rptr. 698 (1962).

<sup>192</sup> 171 Cal. App. 2d 772, 341 P.2d 46 (1959).

<sup>193</sup> *San Diego Professional Ass'n v. Superior Court*, 58 Cal. 2d 194, 203-04, 373 P.2d 448, 453, 23 Cal. Rptr. 384, 389 (1962).

<sup>194</sup> *Suezaki v. Superior Court*, 58 Cal. 2d 166, 177, 373 P.2d 432, 438, 23 Cal. Rptr. 368, 374 (1962).

<sup>195</sup> *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 401, 364 P.2d 266, 291, 15 Cal. Rptr. 90, 115 (1961).

<sup>196</sup> *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 192, 373 P.2d 439, 446-47, 23 Cal. Rptr. 375, 382-83 (1962); *San Diego Professional*

Subsequent to these cases, the California Legislature, on the recommendation of the State Bar,<sup>197</sup> attempted to provide a statutory solution for the "work product" problem:

The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice . . . .<sup>198</sup>

This statute was intended to provide the privacy necessary to encourage attorneys to prepare their cases thoroughly and to investigate the unfavorable, as well as the favorable, aspects of each case. The statute was also intended to prevent one attorney from taking undue advantage of his opponent's work.<sup>199</sup> The courts applied the statute by requiring a showing of "good cause" to obtain the discovery of "work product."<sup>200</sup> The party seeking discovery was required to demonstrate that denial of discovery would unfairly prejudice him in preparing his claim or defense.

The status of "work product" has been greatly affected by a recommendation made by the California Law Revision Commission to establish mandatory pretrial exchanges of information in condemnation actions.<sup>201</sup> The Commission believed this exchange to be a necessity in a condemnation action, explaining that the only substitute for discovery for experts' valuation materials is lengthy and often fruitless cross examination during trial.<sup>202</sup> The recommendation was not accepted when first introduced; however, it was restated in 1966.<sup>203</sup> The Commission again advocated pretrial exchange, explaining that "the obstacles to effective discovery in eminent domain cases may be overcome by legislation providing for an exchange before trial of written statements of valuation data."<sup>204</sup> The technique suggested was not new; it had been used in eminent domain proceedings in the

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*Ass'n v. Superior Court*, 58 Cal. 2d 194, 204, 373 P.2d 448, 454, 23 Cal. Rptr. 384, 390 (1962); *Suezaki v. Superior Court*, 58 Cal. 2d 166, 178, 373 P.2d 432, 439, 23 Cal. Rptr. 368, 374-75 (1962).

<sup>197</sup> Committee Reports: Administration of Justice, 37 CALIF. S.B.J. 585 (1962).

<sup>198</sup> CAL. CODE CIV. PROC. § 2016(b).

<sup>199</sup> CAL. CODE CIV. PROC. § 2016(g).

<sup>200</sup> *Kenny v. Superior Court*, 255 A.C.A. 126, 129, 63 Cal. Rptr. 84, 87 (1967); *Scotsman Mfg. Co. v. Superior Court*, 242 Cal. App. 2d 527, 529, 51 Cal. Rptr. 511, 513 (1966); *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 204, 41 Cal. Rptr. 721, 728 (1964); *Brown v. Superior Court*, 218 Cal. App. 2d 430, 443, 32 Cal. Rptr. 527, 535 (1963). See also *McCoy, California Civil Discovery: Work Product of Attorneys*, 18 STAN. L. REV. 783 (1966).

<sup>201</sup> *Recommendation Relating to Discovery in Eminent Domain Proceedings*, in 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 707 (1963).

<sup>202</sup> *Id.*

<sup>203</sup> *Annual Report*, in 8 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 7 (1966).

<sup>204</sup> *Id.* at 21.

Los Angeles Superior Court<sup>205</sup> and in the United States District Court in Los Angeles<sup>206</sup> for some time.

The recommendations were finally codified in Chapter 1184 of the California Code of Civil Procedure, effective November, 1967.<sup>207</sup> Under this chapter parties are required to exchange lists of expert witnesses intended to be called at trial and statements concerning the subject matter of each expert's testimony.<sup>208</sup> To insure "good faith" exchange of lists of expert witnesses and essential valuation data, the chapter provides that a party cannot, in the absence of a showing of good cause, present an expert witness at trial unless the required information about him and his testimony has been properly exchanged.<sup>209</sup> This procedure is intended to provide a simplified method for the exchange of valuation information. It is not mandatory, however, but applies only if it is invoked by a party to the proceeding.<sup>210</sup> Further, the authors explained that this chapter was not intended to supersede existing discovery procedures.<sup>211</sup> Finally, the "good-cause" requirement found in ordinary discovery is not invoked under this statute;<sup>212</sup> and thus, when the existence of good cause is questionable, the tendency will be to use pretrial exchange, rather than regular discovery procedure.

The chief values of this system are to make the pretrial conference serve a more valuable function in condemnation proceedings, to allow more complete preparation for cross-examination and rebuttal, and to provide an atmosphere more conducive to settlement.

### Comparison and Conclusion

In comparing the pre-trial discovery practice of California with that of the federal courts, it can be seen that each court system has followed the same basic pattern—early restrictions followed by a tendency toward liberal discovery procedure. The attorney-client privilege, once an almost insurmountable obstacle to the discovery of opinions of the adverse party's experts has now been eliminated in condemnation actions in both systems. Such expert opinion has been held not within the privilege.<sup>213</sup> While the "work product" rule is

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<sup>205</sup> See McCoy, *Pretrial in Eminent Domain Actions*, 38 L.A.B. BULL. 439 (1963).

<sup>206</sup> S.D. CAL. R. CIV. P. 9. See also D. LOUISELL, *MODERN CALIFORNIA DISCOVERY* § 1.14, at 16 (Supp. 1967).

<sup>207</sup> CAL. CODE CIV. PROC. §§ 1272.01-.09.

<sup>208</sup> *Id.* § 1272.03.

<sup>209</sup> *Id.* § 1272.05; *Annual Report*, in 8 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, & STUDIES 1352, 1357-58 (1967).

<sup>210</sup> CAL. CODE CIV. PROC. § 1272.01; *Annual Report*, in 8 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, & STUDIES 1352, 1353-54 (1967).

<sup>211</sup> CAL. CODE CIV. PROC. § 1272.08; *Annual Report*, in 8 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, & STUDIES 1352, 1359 (1967).

<sup>212</sup> *Id.*

<sup>213</sup> See, e.g., *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 596 (D.



more of an obstacle to discovery in the California system, with its mandatory requirement of a showing of good cause for the discovery of "work product",<sup>214</sup> good cause should be found to be inherent in every condemnation action.<sup>215</sup> In both systems, opinions formerly considered immune from discovery have become discoverable. Finally, the procedure proposed for the United States Districts Courts,<sup>216</sup> if adopted, would accomplish the same basic result as that achieved by the pretrial practice now required in California.<sup>217</sup> This liberal trend is not limited to California and the federal system, for developments in these two court systems reflect the developments in progressive states across the country.<sup>218</sup>

This trend is desirable because of the uniqueness of eminent domain actions. The condemnee can be characterized as an "innocent bystander" who is being dispossessed. He is innocent because the sole reason for his involvement is his ownership of property needed by the condemnor. The condemnee cannot justifiably deny the state's power to take property for a public use, and usually will not be able to prove a lack of right to take property in this particular condemnation action. The condemnee cannot recover the costs of litigation from the condemnor;<sup>219</sup> and yet, if he does not challenge the value set by the condemnor, the condemnee will be forced to accept that amount as "just compensation" for the property taken.<sup>220</sup> The value established by the condemnor is presumed just, and the burden is upon the condemnee to prove otherwise. In most cases, the funds at the disposal of the condemnee will be no match for those of the condemnor.<sup>221</sup> Thus, the condemnee has a financial disadvantage that can lead to unfair results.

While opening "Pandora's Box"<sup>222</sup> to allow the condemnee full access to government files would be unwise, a guarded relaxation of

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Md. 1963); *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 191, 373 P.2d 439, 446, 23 Cal. Rptr. 375, 382 (1962).

<sup>214</sup> CAL. CODE CIV. PROC. § 2016(b).

<sup>215</sup> *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 415 (N.D. Cal. 1965).

<sup>216</sup> *Proposed Amendments to Civil Rules*, *supra* note 87.

<sup>217</sup> CAL. CODE CIV. PROC. §§ 1272.01-.09

<sup>218</sup> See, e.g., *State ex rel. Wiley v. Whitman*, 91 Ariz. 120, 370 P.2d 273 (1962); *Shell v. State Rd. Dep't*, 135 So. 2d 857 (Fla. 1961); *Jones v. Iowa State H'way Comm'n*, 157 N.W.2d 86 (Iowa 1968); *State ex rel. Reynolds v. Circuit Court*, 112 N.W.2d 686, 15 Wis. 2d 311 (1961). But see *State v. Spruell*, 243 La. 202, 142 So. 2d 396 (1962).

<sup>219</sup> 7 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 71A.20, at 2767.

<sup>220</sup> *Recommendation Relating to Discovery in Eminent Domain Proceedings*, in 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 707, 745 (1963).

<sup>221</sup> 7 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 71A.2[3], at 2767.

<sup>222</sup> *Recommendation Relating to Discovery in Eminent Domain Proceedings*, in 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 707, 746 (1963).

discovery rules in favor of the condemnee is warranted. The proposed amendments to the federal discovery rules<sup>223</sup> provide a desirable approach that is sufficiently flexible to allow discovery in a proper case yet deny discovery when proper cause is not shown or when it would unfairly injure the opponent.

The values of discovery are numerous. In a case relying on technical facts, such as one involving condemnation, it is almost impossible to anticipate the particular approach that will be taken by the opponent's expert. Thus cross-examination is made extremely difficult by denial of discovery.<sup>224</sup> Similarly, effective rebuttal requires an indication of the approach that will be taken by the adverse party's expert. "If [this information] is foreclosed by a rule against discovery, then narrowing of issues and elimination of surprise which discovery normally produces are frustrated."<sup>225</sup> The expert's conclusions are factual evidence at trial—often the exclusive bases for determining fair market value. Since cross-examination is necessary to demonstrate an expert's weakness, and since successful cross-examination will often require pre-trial discovery of complicated matters that make up the testimony, discovery will facilitate litigation.<sup>226</sup>

The pre-trial exchange and the discovery procedures increase the likelihood of settlements. Parties can determine whether the distance between their valuations is great enough to warrant litigation.<sup>227</sup> The early discovery will also make the pre-trial conference more productive. The parties can eliminate many inconsequential "issues." This, together with more productive cross-examination, will lead to shorter proceedings, and thus provide much needed relief to crowded court dockets.<sup>228</sup> In addition, it seems both unfair and unrealistic to refuse to permit pre-trial inquiry into the work of an expert. Such refusal is contrary to the spirit of the Federal Rules.<sup>229</sup>

L. Richard Fischer\*

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<sup>223</sup> *Proposed Amendments to Civil Rules*, *supra* note 87.

<sup>224</sup> *Id.* at 234.

<sup>225</sup> *Id.*

<sup>226</sup> 39 NOTRE DAME LAW. 96, 100 (1963).

<sup>227</sup> See generally Carter, *Pre-Trial in Condemnation Cases, A New Approach*, 40 AM. JUDICIAL Soc'y 78 (1956).

<sup>228</sup> Schuck, *Techniques For Proof Of Complicated Scientific and Economic Facts*, 40 F.R.D. 33, 40 (1967).

<sup>229</sup> Winner, *Procedural Methods to Attain Discovery*, 28 F.R.D. 97, 103 (1962).

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